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In The
SUPREME COURT OF THE UNITED STATES

1453

ALFRED EARL HARFLINGER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
Citations to Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement of Facts	2
Proposition I. Error of the Court in overruling Petitioner's Motion to Suppress	3
a. The arrest of the Petitioner occurred when Corporal Davis by use of his red light, signaled the Petitioner to stop, and in obedience thereto Petitioner did, in fact, stop his vehicle	4
b. The arrest of the Petitioner was unlawful	7
c. If the arrest were legal would the subsequent search of the trunk of the automobile be legal	10
d. The opening of the trunk of Petitioner's vehicle at the request or command of Corporal Davis was not a voluntary act on the part of the Petitioner	12
e. The search of the Petitioner's car after it had been removed to the county jail was unlawful	14
f. The Petitioner's motions to suppress must be sustained	17
Conclusion	18
Appendix A	A1
Appendix B	B1

AUTHORITIES

Page

Cases:

Beck v. Ohio, 379 U.S. 89, 13 L. Ed. 2d 142, 145 17

Bianco v. United States, 189 Fed. 2d 716 5

Brinegar v. U.S., 338 U.S. 160; 93 L. Ed. 1879; 69 S. Ct. 1302 11

Carroll v. U. S., 267 U.S. 132, 69 L. Ed. 543; 455 S. Ct. 280 11

Chimel v. State of California, 23 L. Ed. 2d 685 11

Cochran v. United States, 8 Cir., 21 F. 2d 633,634 17

Henry v. United States, 361 U. S. 98, 103 (1959) 4, 6, 7, 9

James v. Louisiana, 382 U. S. 36, 15 L. Ed. 2d 30, 31 16

Preston v. U. S., 376 U.S. 364, 11 L. Ed. 2d 777 ..... 14, 16

Shorey v. Warden, Maryland State Penitentiary, 401 F. 2d 474, 477 (4th Cir. 1968) 5

Sibron v. New York, 392 U.S. 40 (1968) 6

State v. Napper, Mo. Supp., 381 S. W. 2d 789 8

United States v. Davis, 423 Fed. 2d 974 5

United States v. Festa, 192 F. Supp. 160 (D. C. Mass. 1960) 5

U. S. v. Novero, E.D., Mo., 1944, 58 F. Supp. 275 12

Page

Statutes:

Title 28 U.S.C. 1254 (1) 2

Miscellaneous:

Rules of the Supreme Court, Rule 21 2

Gun Control Act of 1968, Public Law 90-618 2

Section 43.170, R.S.M.O. 1959 6

Section 43.195 R.S.M.O. 1959 8

Section 560.445, R.S.M.O. 1959 9

In The
SUPREME COURT OF THE UNITED STATES

ALFRED EARL HARFLINGER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above case on the 8th day of February, 1971.

CITATIONS TO OPINIONS BELOW

The decision of the United States District Court for the Western District of Missouri is not reported. The opinion of the United States Court of Appeals for the Eighth Circuit printed in the appendix hereto is reported in ____ F.2d ____

JURISDICTION

The jurisdiction of this Court is invoked under Title 28 U.S.C. 1254 (1) and Rules of the Supreme Court, Rule 21.

QUESTIONS PRESENTED

The trial court and the appellate court erred when they failed to follow the rules of law laid down by the United States Supreme Court in allowing evidence to be introduced over the objections of the Petitioner, which evidence was in violation of Petitioner's rights afforded him under the Fourth Amendment of the United States Constitution.

STATEMENT OF FACTS

The Petitioner was convicted by a jury in the United States District Court for the Western District of Missouri on the 23rd day of September, 1969, for two counts, one of manufacturing a destructive device and the other of possessing a destructive device in violation of the Gun Control Act of 1968, Public Law 90-618. On the 27th day of October, 1969, Petitioner was sentenced to a term of ten (10) years to run concurrently.

To briefly state the facts, the Petitioner and another man were by circumstances placed in the early hours of February 22, 1969, around some propane tanks owned by a Mr. Leslie Heriford and later seen at the small town of Ava, Missouri, located a few miles from said place first seen. That after being seen at the town ov Ava, Missouri, they were later stopped by two Missouri State Highway Patrol, questioned and searched; that as a result of said

search, numerous sticks of dynamite, fuse, battery and an alarm clock were found in the trunk of the automobile driven by the two men. They were then placed under arrest and placed in the County Jail. These facts are brief and are more fully set out in the appendix herein.

The Petitioner appealed his judgment and sentence as heretofore set forth to the United States Court of Appeals for the Eighth Circuit and said judgment and sentence was affirmed on the 8th day of February, 1971.

PROPOSITION I

ERROR OF THE COURT IN OVERRULING PETITIONER'S MOTION TO SUPPRESS.

The facts that were produced at the motion to suppress before the Honorable Judge Collison at Springfield, Missouri, were stipulated to by defense counsel and the United States District Court in the Circuit Court of Douglas County, Missouri, and are set forth in the appendix marked "Exhibit B".

That Petitioner's motion to suppress raised the following legal issues:

1. Did the "arrest" of the Petitioner occur when the state highway patrol took control of the movements of the Petitioner and signaled him to stop by "putting the red light on him?"

2. If so, was that "arrest" unlawful?

3. If said arrest was legal, was the subsequent search and seizure of articles in the trunk of the said automobile legal?

4. If the arrest was, as a matter of law, unlawful, was the opening of the trunk by one of the persons in the car an involuntary act not amounting to a waiver of his Constitutional rights?

5. Was the search of the Petitioner's automobile after it was taken to the County Jail, and same 25 minutes later, unlawful?

6. If the arrest and subsequent searches were unlawful, must the evidence derived by the officers from the Petitioner after his arrest be suppressed and the Petitioner's motions sustained?

a. The arrest of the Petitioner occurred when Corporal Davis by use of his red light, signaled the Petitioner to stop, and in obedience thereto Petitioner did, in fact, stop his vehicle.

Under the testimony of Corporal Davis there can be no doubt whatsoever that, by "putting the red light on them," he signaled the Petitioner to stop and intended that he should do so; equally apparent from his testimony is the fact that the Petitioner, in obedience to that signal, parked his vehicle on the east side of the Ava Public Square.

In the case of *Henry v. United States*, 361 U.S. 98, 103 (1959), in which the Supreme Court held an arrest occurred when FBI Agents waived a vehicle to a stop. In that case, the facts showed that FBI agents were investigating the theft of whiskey from an interstate shipment. On the day following the theft, the agents were in the same neighborhood and observed two men carrying cartons from a building to an automobile; unable to follow

the automobile, they found it later near a tavern. The same two men were men seen to leave the tavern and re-enter the car. Again the car returned to the same building and the men were observed to carry more cartons to the car. As the car drove away, the agents followed and "* * * when they met it, waved it to a stop." Searching the car, the agents found it to contain stolen merchandise. See also: *United States v. Davis*, 423 Fed. 2d 974; *Bi. nco v. United States*, 189 Fed. 2d 716; *Shorey v. Warden, Maryland State Penitentiary*, 401 F. 2d 474, 477 (4th Cir. 1968); *United States v. Festa*, 192 F. Supp. 160 (D. C. Mass. 1960).

The Supreme Court first held that the arrest took place when the Federal Agents stopped the car (4 L. Ed. 2d, p. 139):

> "When the officers interrupted the two men and restricted their liberty of movement, the arrest, for purposes of this case, was complete."

Next, the court held that the actions of the two men, though suspicious, were not sufficient to constitute probable cause. The Court said, at page 139 of 4 L. E. 2d:

> "What transpired at or after the time the car was stopped by the officers is, as we have said, irrelevant to the narrow issue before us. To repeat, an arrest is not justified by what the subsequent search discloses. Under our system suspicion is not enough for an officer to lay hands on a citizen. It is better, so the Fourth Amendment teaches, that the guilty some times to go free than that citizens be subject to easy arrest."

Since the arrest, which occurred on the mere stopping of the vehicle, was unlawful, the court held all of the evidence obtained by a search of the automobile to be unlawfully obtained and, therefore, inadmissible.

The facts in the present case show even more clearly than in the *Henry* case, supra, that the stopping of the vehicle by the Highway Patrol was an arrest. This court no doubt realizes that FBI agents operate from unmarked cars and do not wear uniforms. But in our case, the arrest was made by two Highway Patrolmen, driving an official vehicle with the Missouri emblem, a red light, and "* * * all the accouterments and equipment that is necessary on a patrol car." The Patrolmen were in their official uniforms and were armed with guns readily apparent in their holsters. *Sibron v. New York*, 392 U.S. 40 (1968). The *Sibron* court, like so many others, has condemned that type of procedure in these words:

> "* * * Nothing resembling probable cause existed until after the search had (been made). It is axiomatic that an incident search may not precede an arrest and serve as part of its justification—The police officer is not entitled to seize and search every person whom he sees on the street or of whom he makes inquiries. Before he places a hand on the person of a citizen in search of anything, he must have constitutionally adequate reasonable grounds for doing so—" (Slip Opinion, pp. 20, 21)

When the officers "put the red light" on the Petitioner, the Petitioner not only did stop, but, in fact, had a legal obligation to do so. Had he not stopped, the driver would have been guilty of a misdemeanor under Section 43.170, R.S. Mo. 1959, which is as follows:

> "It shall be the duty of the operator or driver of any vehicle or the rider of any animal traveling on the highways of this state to stop on signal of any member of the patrol and to obey any other reasonable signal or direction of such member of the patrol given

> in directing the movement of traffic on the highways. Any person who wilfully fails or refuses to obey such signals or directions or who wilfully resists or opposes a member of the patrol in the proper discharge of his duties shall be guilty of a misdemeanor and on conviction thereof shall be punished as provided by law for such offenses."

It is true that Corporal Davis, in his testimony, said that he arrested the Petitioner after removing a .38 revolver from the automobile; this, of course, is simply a conclusion on his part and amounts to nothing more than his testimony as to the point at which he verbally informed the Petitioner that he was under arrest. Such a conclusion can have no effect on the facts which had already occurred.

The facts show clearly that when the Petitioner's vehicle, in obedience to the signal of the officers, parked at the curb, there was "an actual restraint of the person" and a "submission to the custody of the officer," as contemplated by Section 544.180. The *Henry* case, supra, which held the arrest to have occurred when the officers "interrupted the two men and restricted their liberty of movement" by waiving the vehicle to a stop should surely be the final authority, if any further authority be needed, for an affirmative answer to the first issue set out above.

b. The arrest of the Petitioner was unlawful.

There is no claim in this case that the arresting officers made the arrest pursuant to an arrest warrant or that they searched the Petitioner's vehicle pursuant to a search warrant.

The general rule applicable to a law enforcement of-

ficer is, of course, that he may arrest without a warrant on reasonable grounds to suspect that the person arrested has committed a felony. *State v. Napper,* Mo. Sup., 381 S. W. 2d 789.

By virtue of Section 43.195 R.S.M.O. 1959, a highway patrol officer may arrest without a warrant, any person he sees violating, or whom he has reasonable grounds to believe has violated any law of this state relating to the operation of motor vehicles.

We respectfully submit that a review of the facts existing at the time of the arrest of the Petitioner by stopping him shows that there was no justification whatsoever, under the rules just mentioned, for the arrest.

We have shown in the statement of facts that the highway patrol simply observed the Petitioner driving his automobile and chose to stop him. Perhaps the worst offense that the Petitioner committed was that he was "a stranger" and unknown to the arresting officers. But there is no rule of law, to our knowledge, authorizing a law enforcement officer to stop and detain a person or to restrict a person's liberty of movement simply because that person is a stranger in the community. Corporal Davis admitted on cross-examination when he saw strangers in early morning hours he stopped them for questioning. There is not even a contention on the part of the prosecution that these troopers knew that a crime had been committed prior to the arrest, much less that the Petitioner had committed a crime.

Even Corporal Davis does not claim that a traffic law was violated. As Corporal Davis said, both on direct and cross-examination, the driver started to go into the wrong

lane on a one way street, but "* * * at the last moment * * *" corrected himself and operated the vehicle properly.

Even if it be assumed, as we mentioned in our statement of fact, that Mr. Heriford apprised the highway patrolmen of all that he knew regarding the earlier events, the Government's position is not improved in the least. There can be no claim that the driving of a vehicle on a public highway at any hour is a violation of any law. There is no contention that the vehicle was operated improperly in any way or that any traffic law was violated at that time.

So far as the automobile tracks and footprints found near the witness's bulk tank plant are concerned, there is no evidence to connect the Petitioner with that event. But, even if it again be assumed that these persons were responsible for the prints in question, this is no evidence of criminality.

The property in question was not posted with "no trespass" or "keep out" signs of any kind. And, therefore, whoever may have been on the premises is not even guilty of a trespass. Section 560.445, R.S.M.O. 1959.

Under the rationale of all the cases, the validity of the arrest must stand or fall on the facts known to the arresting officers at the moment of the arrest. The Government's case cannot be buttressed by the fact that the subsequent searches tended in any way to confirm whatever suspicions the arresting officers may have had. As the Supreme Court said in *Henry*, supra, an arrest cannot be justified by what the subsequent search discloses. If no probable cause existed for the arrest, all searches made by the officers as an incident of that arrest are illegal

and unlawful and the state can take no advantage of the evidence produced thereby.

It is to be noted that the testimony of Corporal Davis is to the effect that it was only after he had stopped the Petitioner that he claims to have seen a part of the butt of a revolver under the seat of the Petitioner's car. Considering the location, it could not be argued otherwise. The fact that it was visible through the window or open door is of no consequence, since, as we have shown, the arrest had already occurred.

In the present case, Corporal Davis saw what appeared to be the butt of a gun under the seat of the car. He then closed the car door, went around to the driver's side, opened that door, got in the vehicle, and removed the revolver and ammunition in a clip. It was after this that the formal arrest took place.

Since the patrolman confirmed his belief that there was a weapon in the car only by searching the car before the formal arrest, that search was equally illegal, and could afford no justification for that arrest. It necessarily follows, when the evidence of the gun is removed from the picture, even the formal arrest itself was unlawful and all subsequent events, including later searches, were unlawful.

c. If the arrest were legal would the subsequent search of the trunk of the automobile be legal?

Petitioner contends that even though the arrest was legal, which he denies, the subsequent search of the automobile would have been illegal in that from the testimony of Corporal Davis, he placed him under arrest after he

observed weapons under the front seat of the automobile, at that time he had alighted from the automobile and was under complete control of the arresting officers and the automobile was under the complete control of the arresting officers. As set forth in *Chimel v. State of California,* 23 L. Ed. 2d 685, it was held that they had the right to search the Defendant and in an area from within which the arrested person might have obtained either a weapon or something that could have been used as evidence against him. In the case at bar, the search warrant for the search of said automobile could have been easily obtained at the Court House which was only a short distance from where Petitioner was arrested, and said party was under the complete control of the arresting officers as well as the automobile and there was no danger of it not being practicable to secure a warrant because the vehicle could have been quickly moved out of the jurisdiction in which the warrant might be sought as it was under the officers complete dominion and control. See *Carroll v. U. S.,* 267 U.S. 132, 69 L. Ed. 543; 455 S. Ct. 280; *Brinegar v. U.S.,* 338 U.S. 160; 93 L. Ed. 1879; 69 S. Ct. 1302.

It is the Petitioner's contention that the *Chimel* case, supra, is prevailing in this respect and that even assuming that the arrest of the Petitioner was legal, the subsequent search of the trunk of the car was illegal in that the arresting officers should have procured a warrant for the search of the trunk of the car.

d. The opening of the trunk of Petitioner's vehicle at the request or command of Corporal Davis was not a voluntary act on the part of the Petitioner.

We believe that the evidence obtained from the trunk of Petitioner's car, namely: dynamite, wire, a clock, a battery, fuses and a cap, falls in a somewhat separate category because we anticipate that the state may argue that the Petitioner, Harflinger, voluntarily opened the trunk.

At the time of the search of the trunk, even Corporal Davis agrees that the Petitioner was under arrest for he testified that, after removing the revolver and .4 clip from the front of the car, he "* * * placed the subjects under arrest."

The testimony of the arresting officer in *U.S. v. Novero*, E.D., Mo., 1944, 58 F. Supp, 275, is similar. There, Federal Agents went to Appellant's farm in his absence and found illegal whiskey on the premises. They then called other officers in town and caused them to "pick up" the defendant and took him to the farm. Two buildings were locked, and the defendant opened them at the officer's request. The record showed that the circumstances were these:

Judge Richard M. Duncan, in holding the search unlawful, had this to say on the question of whether the defendant voluntarily unlocked the doors (l. c. 280, 281):

> "Where one in custody peacefully submits to the demands of an officer for the unlocking of premises, it is not a waiver of his constitutional rights. United States vs. Slusser, D.C., 270 F. 816, 819. As the search of the smokehouse and garage was without probable cause, and as defendant did not waive his constitutional rights by peacefully complying with the orders of the officers in whose custody he was, to unlock the buildings, the

> evidence obtained as a result of the search cannot be used to secure his conviction. The agent requested him to unlock the buildings and he complied with the request. In so doing, he did not waive any rights which were afforded him under the Constitution."

Judge Duncan accordingly, sustained the defendant's motion to suppress the evidence obtained from the buildings in question.

In the above case, as in this, the arrest had taken place, the defendant was in custody, as was the Petitioner herein, and here, as there, the Petitioner, Harflinger, peacefully submitted to the demands of the officer. And here, as there, it must necessarily be held that by so doing, there was no waiver of the rights of the Petitioner.

We respectfully submit that the obedience of Petitioner Harflinger to the command of the officer, occurring at a time when the Petitioner was under arrest and had been advised that he was under arrest, was not a voluntary act or a waiver of any of the Petitioner's rights Accordingly, the evidence found in the trunk of the vehicle is in no different category than the evidence earlier found underneath the seat of the car.

The orginal stopping of the car was an unlawful arrest, and the search of the front of the car was equally unlawful, so that the state cannot even contend that the later formal arrest, allegedly for carrying concealed weapons, was a valid arrest. The second arrest necessarily falls with the suppression of the .38 caliber revolver and .45 clip.

e. The search of the Petitioner's car after it had been removed to the county jail was unlawful.

The facts on this point are simple. Corporal Davis testified that after formally arresting the Petitoner and seeing the dynamite and other items in the trunk of the car, the officers handcuffed Petitioner and took him to the County Jail, and that the automobile was also taken to the County Jail and "locked up" and the keys given to Corporal Davis. The jail was approximately one-half block from the point of arrest. Some 25 minutes later Corporal Davis and the Sheriff returned to the car and searched it again, finding a .45 automatic pistol, additional ammunition, and also removed the dynamite and other items found in the trunk of the car.

Completely aside from the issues with respect to the carlier searches, this last search and seizure was clearly unlawful, for it occurred after the arrest, was not incident to the arrest, and was at a different location. Exactly the same factual situation was present in *Preston v. U.S.*, 376 U.S. 364, 11 L.Ed. 2d 777. In that case, police officers had arrested three men on a vagrancy charge. The men were taken to police headquarters for booking and the car in which they had been arrested was towed to a garage.

Shortly after booking the men, the officers went to the garage and searched the vehicle. They found loaded revolvers in the glove compartment and other evidence in the locked trunk, all of which was used against the Appellants at their trial on charges of conspiring to rob a bank. In holding the search to be unlawful, the Supreme Court did not find it necessary to consider the legality of the arrest itself, since the search at a later time and at a different place was clearly

not incident to the arrest. The Court said at page 780 of 11 L.Ed. 2d:

> "Our cases make it clear that searches of motor cars must meet the test of reasonableness under the Fourth Amendment before evidence obtained as the result of such searches is admissible.
>
> It is argued that the search and seizure was justified as incidental to a lawful arrest. Unquestionably, when a person is lawfully arrested, the police have the right, without a search warrant, to make a contemporaneous search of the person of the accused for weapons or for the fruits or implements used to commit the crime. This right to search and seize without a search warrant extends to things under the accused's immediate control. * * * and to an extent, depending on the circumstances of the case, to the place where he is arrested. The rule allowing contemporaneous searches is justified, for example, by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime — things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control. But these justifications are absent where a search is remote in time or place from the arrest. The search of the car was not undertaken until petitioner and his companions had been arrested and taken in custody to the police station and the car had been towed to the garage. At this point there was no danger that any of them arrested could have used any weapons in the car or could have destroyed any evidence of the crime — assuming that there are articles which can be the "fruits" or "implements" of the crime of vagrancy. Nor, since the men were under arrest at the police station and the car was in police custody at a garage, was there any danger that the car would be moved out of the locality or jurisdiction. We think that the search was too remote in time or

> place to have been made as incidental to the arrest and conclude, therefore, that the search of the car without a warrant failed to meet the test of reasonableness under the Fourth Amendment, rendering the evidence obtained as a result of the search inadmissible."

Finally, in an even more recent case, the Supreme Court re-emphasized that a search incident to an arrest must be substantially contemporaneous with the arrest and in the immediate vicinity of the arrest. The court said in *James v. Louisiana,* 382 U.S. 36, 15 L. Ed. 2d 30, 31:

> "The Supreme Court of Louisiana found that the officers had probable cause to arrest the petitioner at the time they apprehended him and the validity of his arrest is not here in issue. In the circumstances of this case, however, the subsequent search of the petitioner's home cannot be regarded as an incident to his arrest on a street corner more than two blocks away. A search can be incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest."

In *Preston* supra, the last search was made after the arrest, after the Appellants had been taken to the County Jail, and after the car had been removed from the scene of the arrest. In this case, as in that case, there was no danger that these men could have used any weapon in the car, that they could have destroyed any evidence, or that the car could be moved out of the locality without the approval of the law enforcement officers, since they had the keys.

Finally, in this case, as in the *Preston* case, supra, all of the evidence obtained by this last search must necessarily be held inadmissible and, therefore, be suppressed.

f. The Petitioner's motions to suppress must be sustained.

We recognize that the court may, at times, find it distasteful to suppress evidence under circumstances showing that the law enforcement officers' hunches were correct. But the protection afforded by the provisions of the United States Constitution applies to all persons. This was well stated in *Cochran v. United States*, 8 Cir., 21 F.2d 633, 634, where the court said:

> "* * * The protection (of the Fourth Amendment to the Constitution of the United States) thereby afforded extends alike to all persons, the unjust as well as the just, and the guilty as well as the innocent. Its cloak is a protection from unreasonable searches and seizures and no arrest or seizure without a warrant is legal except on probable cause."

The fact that the arrest in this case can be justified only if the arrest was valid when made, and cannot be justified by later occurrences, is shown by the statement of the Supreme Court of the United States in *Beck v. Ohio*, 379 U. S. 89, 13 L.Ed. 2d 142, 145, where it is said:

> "The constitutional validity of the search in this case, then, must depend upon the constitutional validity of the petitioner's arrest. Whether that arrest was constitutionally valid depends in turn upon whether, at the moment the arrest was made, the officers had probable cause to make it — whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense."

To say that the evidence herein is admissible would be to say, in effect, that a police officer havng little grounds

for suspicion, and certainly no grounds for probable cause to believe that a felony had been committed, can stop any citizen on the public highway, for no valid reason whatsoever, and, under the pretext of questioning the citzen or examining his driver's license, peer into his automobile, observe evidence which he then believes to be evidence of a crime, and thereby justify the seizure of that evidence and the later formal arrest, as well as all searches made thereafter.

CONCLUSION

For the foregoing reasons and in view of the proposition as set out above, Petitioner prays his Writ of Certorari be granted.

Respectfully submitted,

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APPENDIX

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 20,017

United States of America,
Appellee,

v.

Alfred Earl Harflinger,
Appellant.

Appeal from the United States District Court for the Western District of Missouri.

[December 31, 1970.]

Before MEHAFFY, GIBSON and LAY, Circuit Judges.

GIBSON, Circuit Judge.

The defendant Alfred Earl Harflinger was indicted and, in a jury trial, convicted on two counts of possessing a prohibited firearm, a bomb, in violation of 26 U.S.C. § 5861(c), and an unregistered firearm, a bomb, in violation of 26 U.S.C. § 5861(d).[1] A co-defendant, James Wil-

1 26 U.S.C. § 5861 provides in pertinent part:

"It shall be unlawful for any person—

* * *

"(c) to receive or possess a firearm made in violation of the provisions of this chapter; or

"(d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Tansfer Record;"

Under § 5845(a)(8), the term "firearm" includes a "destructive device," defined under sub(f) as including a bomb.

liam Nash, was also so charged and convicted but is now deceased. Harflinger received a sentence of 10 years on each count, the sentences to be served concurrently. On appeal Harflinger has filed two briefs, one by his court-appointed counsel and another pro se, raising a series of questions relating to arrest, search and seizure, grand jury notes, Fifth Amendment guarantees, and pretrial disclosure of names of government witnesses.

We have considered all the issues raised in both briefs but will discuss only those that are relevant and that have sufficient substance to merit discussion. Those issues not discussed are deemed to be without merit. We affirm the judgment of conviction.

A somewhat comprehensive recitation of the factual background of defendant's arrest and the search and seizure of the evidence supporting the charges is necessary to place in context the defendant's claims of error on this appeal.

Leslie Heriford, a liquid petroleum gas dealer living two and half miles north of Ava, Missouri, had been warned to watch out for his equipment. On February 22, 1969, Heriford awoke about 4:30 a.m. with an upset stomach and, while seeking medicinal relief, noticed a car turned crossways in the road with its lights shining on his barn. The car backed up into the highway and drove slowly past his house. His carport light illuminated part of the highway and enabled him to determine that the automobile was a late model black over white Chevrolet. He was not able to see the persons in the car. He told his wife about the incident prior to leaving home early that morning. Mrs. Heriford left home about 6:40 a.m. and while proceeding to the Ava post office she met a late model black over white Chevrolet headed north, about a

half mile from the Herifords' 18,000 gallon propane tank. She could see the driver of the car, whom she identified at trial as the defendant, but she could not see the passenger clearly enough to make an identification. As she passed the storage tank just prior to meeting the Chevrolet, she had noticed tire tracks made in the snow leading to the storage tank. When she reached the post office she called her husband to see if he had been around the tank that morning and told him about the tire tracks in the snow. Upon receiving this information, Heriford and a nephew, Marvin Lofton, drove to the bulk storage tank where they noticed that a car had been driven in, had stopped (apparently to let someone out), and then continued on the circular drive around the tank and back to the road. The person who alighted from that vehicle left distinctive bootprints in the snow made by a lugged sole. His tracks indicated that he walked up to the tank, circled it, then walked across the pasture and reentered the automobile.

Heriford and Lofton then drove to Ava in an attempt to locate the automobile which Heriford had observed earlier in his driveway. They spotted the car at Maples Cafe. Upon entering the cafe, Heriford saw two strangers seated at a table, one of whom was wearing boots with a lugged sole that appeared to be identical to the tracks Heriford observed near his storage tank. The individuals in question turned out to be the defendant Harflinger and his co-defendant Nash. Heriford then sent for the highway patrol in an attempt to find out why Harflinger and Nash had been around his storage tank. In the interval, Harflinger and Nash left the cafe and entered their automobile, a black over white Chevrolet bearing Missouri license plates.

Corporal Davis and Trooper Moore of the Missouri State Highway Patrol arrived at the cafe as the Chevrolet was leaving. Corporal Davis immediately made radio contact with his headquarters and requested a license check. He was advised that the license in question was issued to a Robert Brockman of St. Louis, Missouri, for a 1967 Chevrolet. Davis then had a conversation with Heriford, after which Davis and Moore proceeded to the square of Ava where they met the 1967 Chevrolet heading back toward the square. Davis turned the patrol car around and caught up with the Chevrolet as it started to enter the square. He immediately used his red light to stop the Chevrolet, which pulled to the curb on the east side of the square.

Davis parked the patrol car at the side of the Chevrolet and both Davis and Moore got out of the patrol car as the two occupants of the Chevrolet were emerging from their car. Davis asked Harflinger and Nash for their driver's licenses, which they produced, and asked what their business was in Ava. Harflinger replied he was looking for a friend named Art but did not provide any last name for Art. Nash said he was a heavy equipment operator seeking employment. Davis then inquired as to the owner of the 1967 Chevrolet and was told it belonged to a friend whose name they would not disclose. Harflinger and Nash did not produce registration papers for the automobile and did not furnish information regarding the registered owner.[2]

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2 Although proper driver's licenses were produced, the information given about the ownership of the car was evasive and unsatisfactory in light of the fact that the motor vehicle was licensed to someone other than the two occupants and gave rise to probable cause for their arrest for automobile theft. *Sewell* v. *United States*, 406 F.2d 1289, 1292 (8th Cir. 1969).

Davis glanced into the Chevrolet and could see from his position outside of the car a claw hammer, large pliers and a butt end of a pool cue. On the front seat cushion he saw a roll of black friction electrical tape, two or three pairs of jersey cloth gloves and two or three road maps. One of the maps had the name "Leslie Heriford" written on it.

Davis then glanced into the interior of the automobile through the front door of the passenger side, which had been left open by Nash, and observed what appeared to be a chrome-plated handgun. After closing the car door, he moved Harflinger and Nash to the rear of the vehicles and told Trooper Moore to watch them. Davis then went to the driver's side, opened the door and looked beneath the seat; finding nothing on the driver's side, he reached over under the seat on the passenger's side and removed the chrome-plated handgun he had previously seen. It was a fully loaded .38 caliber revolver. Alongside of the revolver was a full clip of ammunition for a .45 caliber automatic.

Harflinger and Nash were then placed under arrest for having a concealed weapon, a violation of V.A.M.S. § 564.610, and given *Miranda* warnings. Davis asked Harflinger to open the trunk of the Chevrolet. Harflinger did not say anything but responded by stepping forward and unlocking the trunk. After the trunk lid was raised Davis observed a cardboard box in the trunk. Inside the box were ten sticks of dynamite, a length of slow fuse, an electric blasting cap with several feet of lead wire, an alarm clock and a 6-volt battery. The clock was ticking and Davis, thinking the device might be dangerous, pulled the wries loose from the clock. This homemade destructive device or bomb was so constructed that it could be

set and made fully operative by placing one of the taped lead wires in the top of the alarm clock near a small hole which had been drilled in the face of the clock. It would thus be a time bomb which could be detonated as desired within the space of an hour. After disarming the bomb, Davis asked Harflinger and Nash if they knew anything about the bomb and they both stated they knew nothing about it or how it got into the trunk. The evidence adduced at the trial, however, showed that the fabric of five of the six gloves Davis took from the Chevrolet contained particles which were similar to particles of the dynamite found in the trunk of the Chevrolet. Likewise, similar particles were found on the shirts and trousers of Harflinger and Nash. In addition, the cut on the end of the roll of friction tape found on the front seat of the Chevrolet exactly matched the cut on one end of the tape used to tape the wire to the alarm clock.

Harflinger and Nash were then handcuffed and taken to the jail, which was less than a block from where the arrest occurred. Davis asked Lofton, who had arrived at the scene by this time, to drive the Chevrolet to the jail while Davis followed. Lofton parked the Chevrolet at the jail, locked it, and gave the keys to Davis, who then went inside the jail to assist in fingerprinting and booking Harflinger and Nash. After the booking Davis returned to the Chevrolet, unlocked the trunk and removed the bomb. This search also revealed a .30-30 Marlin rifle in the trunk and a fully loaded .45 caliber pistol under the dash. The ash tray contained ammunition for the rifle and the .45 automatic pistol.[3]

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[3] The two handguns, the rifle and the ammunition were not received into evidence. The .38 caliber revolver and the ammunition in it were admitted into evidence but were later withdrawn.

The next day Davis found a 1964 Chevrolet II parked in Ava which was registered to Nash. A subsequent check verified that the destructive device found in the 1967 Chevrolet was not registered in the National Firearms Registration and Transfer Record to Harflinger, Nash or anyone else.

Harflinger filed a pretrial motion to suppress the evidence obtained in the search of the 1967 Chevrolet claiming an unconstitutional arrest, search and seizure of the bomb and other incriminating evidence obtained in that search. He also contends that the original warrantless stopping of Nash and him was unlawful and that, if there were probable cause for the arrest, the act of causing the trunk to be opened (thereby revealing the bomb) constituted an unlawful search. The trial court overruled the motion.

THE INVESTIGATIVE STOP, ARREST, SEARCH AND SEIZURE

Initially, Harflinger argues his arrest occurred when he complied with Corporal Davis' signal to stop (the flashing red light); he equated this investigative stop to an arrest under *Henry* v. *United States,* 361 U.S. 98 (1959). We disagree. Harflinger was not arrested at that time but was merely stopped for investigative purposes.

The brief detention of a citizen based upon an officer's reasonable suspicion that criminal activity may be afoot is permissible for the purpose of limited inquiry in the course of a routine investigation, and any incriminating evidence which comes to that officer's attention during this period of detention may become a reasonable basis for effecting a valid arrest. As explicated in *Terry* v. *Ohio,*

392 U.S. 1 (1968), there is a difference between a limited detention or seizure of a person and an arrest. *See also Rodgers* v. *United States,* 362 F.2d 358, 362 (8th Cir.), *cert. denied,* 385 U.S. 993 (1966), ("a routine license check and its concomitant temporary delay of a driver . . . do not constitute an arrest in the legal sense"). Any intrusion upon a person's liberty or search of his person, car or other area in which he is located must be limited and confined to the circumstances and exigencies of the matter or conduct under investigation to comply with the Fourth Amendment's guaranty against "unreasonable searches and seizures." In making an assessment of the stopping and limited detention in the instant case, the facts are to be judged against an objective standard of reasonableness: "would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" *Terry* v. *Ohio,* 392 U.S. at 21-22. In *Carpenter* v. *Sigler,* 419 F.2d 169, 171 (8th Cir. 1969), in an opinion written by Chief Judge Van Oosterhout, this Court observed that the judicial inquiry into the question of reasonableness under *Terry* v. *Ohio* is a dual one:

> "(1) whether the facts warranted the intrusion on the individual's Fourth Amendment rights, and (2) whether the scope of the intrusion was reasonably related 'to the circumstances which justified the interference in the first place.'" (footnote omitted.)

We are convinced that both the stop and the limited inquiry which followed were reasonable under the circumstances and met the test of *Terry.* In balancing the government's need to stop a person against the invasion of personal liberty and privacy which such a seizure entails, we think the need to detain for limited inquiry clearly out-

weighed Harflinger's interest in freedom of action. *Terry* v. *Ohio, supra; see also Camera* v. *Municipal Court,* 387 U.S. 523 (1967). Corporal Davis had previously talked to Leslie Hariford about Harflinger's and Nash's suspicious conduct and had caused a license check be made on the car they were driving. With this information Davis had the right to inquire of Harflinger about his activities and to make a limited detention of Harflinger for that purpose.

We believe police officers have a duty, as well as the right, to investigate complaints from apprehensive potential victims. Even though a crime had not been committed prior to the investigative stop and might never be committed, the stop and the ensuing limited detention for investigative inquiry must be permitted when officers reasonably suspect that criminal activity may be afoot if the police are to carry out their legitimate functions of crime prevention and detection. *United States* v. *Unverzagt,* 424 F.2d 396 (8th Cir. 1970); *Carpenter* v. *Sigler, supra; Dupree* v. *United States,* 380 F.2d 233 (8th Cir. 1967), *cert. denied,* 392 U.S. 944 (1968); *Jackson* v. *United States,* 408 F.2d 1165 (8th Cir.), *cert. denied,* 396 U.S. 862 (1969); *United States* v. *Lewis,* 362 F.2d 759 (2d Cir. 1966); *United States* v. *Self,* 410 F.2d 984 (10th Cir. 1969); *United States* v. *Williams,* 416 F.2d 4 (5th Cir. 1969), *cert. denied,* 397 U.S. 910 and 968 (1970); *United States* v. *Thompson,* 420 F.2d 536 (3d Cir. 1970).

Harflinger attempts to make much out of Corporal Davis's testimony at the state court hearing on a motion to suppress that he followed a practice of stopping out-of-state automobiles. We cannot condone such a patently unconstitutional intrusion upon the rights of any citizen, but here there was a reasonable basis for stopping Har-

flinger and Nash. The stop was not made on the basis of an out-of-state license plate or by the fact that they were strangers in the community. Reasonable suspicion for an investigative stop, like probable cause for an arrest, is determined by objective facts. *Terry* v. *Ohio*, 392 U.S. at 22; *Klingler* v. *United States*, 409 F.2d 299, 304 (8th Cir.), *cert. denied*, 396 U.S. 859 (1969); *United States* v. *Skinner*, 412 F.2d 98, 102 (8th Cir.), *cert. denied*, 396 U.S. 967 (1969).

Harflinger, in his pro se brief, contends that he did not voluntarily get out of the car when he was stopped but was ordered to do so by Trooper Moore and views this action of the officer as an arrest. We do not think the scope of the intrusion is so significantly enhanced by requiring a suspect to get out of his car to answer questions that the investigative stop can then be equated to an arrest. In addition to upholding the police officer's right to stop a suspect based on a reasonable suspicion less than probable cause, *Terry* v. *Ohio* also recognized there is a very valid governmental interest in allowing police officers to take limited steps to assure themselves that the person with whom they are dealing is not armed, including a limited search of the suspect for weapons. We are cognizant that *Terry* approves such protective searches of a suspect only "where nothing in the initial stages of the encounter [investigative stop] serves to dispel his reasonable fear for his own or others' safety." 392 U.S. at 30. Nonetheless, we think it within the reasonable scope of an investigative stop to order the suspect out of the car to answer questions. This not only enables the officer to better judge the suspect's demeanor and hear his answers, but also fosters the recognized self-protection interest in that the officer can fully observe the suspect and

the suspect is removed from any readily available weapon that might be in the car. *See Carpenter* v. *Sigler,* 419 F.2d at 172.

THE SEIZURE OF THE BOMB

It is recognized principle that, assuming the existence of probable cause to arrest, automobile and other vehicles may be searched without warrants as incident to the arrest " 'where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.' *Carroll* v. *United States,* 267 U.S. 132, 153; see *Brinegar* v. *United States,* 338 U.S. 160." *Chimel* v. *California,* 395 U.S. 752, 764 n.9 (1969). As we discussed in footnote 2, the officers' reasonable suspicions developed into probable cause to arrest for auto theft during the questioning of the suspects. Furthermore, prior to searching the car, Officer Davis observed a .38 caliber revolver which was partially hidden under the seat on the passenger's side. Consequently, the officers not only had probable cause to arrest the suspects for carrying a concealed weapon, but they also had probable cause to search the car for other weapons.

"It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence." *Harris* v. *United States,* 390 U.S. 234, 236 (1968). "[T]hings which are visible and accessible and in the offender's immediate custody can be seized by the police . . . ." *United States* v. *Baca,* 417 F.2d 103, 105 (10th Cir. 1969). Here, the pistol was in plain sight and was observed by one arresting officer prior to the arrest from a vantage point where the officer had a

right to be. Since the gun was properly observed, the observation was not a search and supplied the basis for probable cause to arrest the suspects and probable cause to search the car for other weapons. *Carpenter* v. *Sigler,* 419 F.2d at 172; *Theriault* v. *United States,* 401 F.2d 79, 83 (8th Cir. 1968), *cert. denied,* 393 U.S. 1100 (1969); *United States* v. *Briddle,* ... F.2d ... (8th Cir. No. 20169 Nov. 10, 1970) (slip opin. at 6-7); *United States* v. *Holgerson,* 424 F.2d 1130 (10th Cir. 1970).

After seizing the .38 revolver, Officer Davis placed Harflinger and Nash under arrest and gave them the *Miranda* warnings. Davis then asked Harflinger if he would open the trunk of the car, which Harflinger did. Inside a cardboard box in the trunk Davis found the time bomb.

After Davis observed the concealed weapon inside the suspect's car, there was clearly probable cause to believe that the car contained other weapons, articles which the officers were obviously entitled to seize. In *Chambers* v. *Maroney,* 399 U.S. 42 (1970), the Supreme Court reaffirmed the principle of *Carroll* v. *United States,* 267 U.S. 132 (1925):

> "*Carroll, supra,* holds a search warrant unnecessary where there is probable cause to search an automobile stopped on the highway; the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained. Hence an immediate search is constitutionally permissible." 399 U.S. at 51.

The search of the trunk was made immediately after the arrest, the bomb was discovered and disarmed, and, although the bomb itself was not physically seized, the car was seized, including its contents. Even should we assume that the bomb was not seized until it was actually removed

from the trunk of the car at the jail, probable cause to search clearly still obtained at the jail and so did the mobility of the car. The warrantless search of the car and the seizure of the bomb in its trunk were clearly permissible under *Chambers* v. *Maroney*.

In addition, since we conclude that the search of the trunk and seizure of the bomb were contemporaneous with the arrests of the suspects and were made at the place of arrest, the search which produced the incriminating evidence was also justified as a search incident to a lawful arrest. Nothing said in *Preston* v. *United States*, 376 U.S. 364 (1964), is antithetical to this conclusion as probable cause existed for the search and the search was not too remote in time and place.

We do not think the fact that Corporal Davis waited a few minutes until the suspects were confined before taking physical possession of the bomb invalidated the search and seizure. To have removed the bomb at the time and place of arrest would have been dangerous to the safety of Davis and others at the scene of the arrest. To have allowed the car to remain parked at the curb or to have allowed the bomb to remain in the trunk of the car after it was parked at the jail, while the officers obtained a search warrant, would have been reckless conduct indeed, for it was quite conceivable that the bomb might explode if the car received an unusual jolt or shock.

Defendant's contention that he did not voluntarily open the trunk is immaterial. This Court made clear in *Gullett* v. *United States*, 387 F.2d 307, 311-312 (8th Cir. 1967), *cert. denied*, 390 U.S. 1044 (1968), that the search of the trunk of a car is within the permissible scope of a warrantless search incident to a lawful arrest.

DISCLOSURE OF MATTERS OCCURRING BEFORE GRAND JURY

Harflinger filed a pleading entitled a pretrial motion for "Disclosure of Matters Occurring Before the Grand Jury," alleging that the transcript was necessary to impeach any witness testifying against him and to determine whether matters occurring before the grand jury provided grounds for a motion to dismiss the indictment.

The trial court denied the motion for lack of good cause but without prejudice to renewing the motion during the trial.

Harflinger contends that the motion was denied because there was no transcript of any testimony of the witnesses who appeared before the grand jury. He further maintains that he has been denied due process in that the United States District Attorney deliberately failed to have recorded the grand jury witnesses' testimony in order to defeat the granting of any motion of Harflinger to produce testimony taken before the grand jury and that these tactics of the Government are fatally defective to the validity of the indictment.

The Government did not base its opposition to Harflinger's motion on the fact that the grand jury testimony was not available. The testimony was recorded and transcribed and would have been available for inspection upon an order of the court, during the trial, if "particularized need" had been shown by the defendant. The Government correctly points out that grand jury testimony is ordinarily not discoverable on a pretrial motion, but it is discoverable after a witness has testified at the trial if the defendant shows a particularized need. We have exhaustively considered these same issues in our recent

opinion in *Hanger* v. *United States,* 398 F.2d 91, 95-98 (8th Cir. 1968), *cert. denied,* 393 U.S. 1119 (1969), and defendant has failed to set forth any arguments which require us to elaborate on our views. *See also United States* v. *Davis,* 410 F.2d 959, 961 (8th Cir. 1969); *Stewart* v. *United States,* 395 F.2d 484, 492 (8th Cir. 1968). Furthermore, Harflinger did not renew his request for the transcript of the grand jury testimony of any witness during or after the direct examination of the witness; consequently, no timely request has been made by him. *Hanger* v. *United States,* 398 F.2d at 97-98; *United States* v. *Davis,* 410 F.2d at 961. While the grounds stated by Harflinger in his motion may have been sufficient to establish a particularized need for production of the grand jury minutes had that motion been renewed during or after the direct examination of the witness(es), we do not think that *Dennis* v. *United States,* 384 U.S. 855 (1966), commands the disclosure of a witness's grand jury testimony prior to the time of his testimony at trial.

While there is nothing in the record which supports Harflinger's contention that the grand jury testimony was not recorded, neither statute nor the Constitution requires that the testimony of witnesses before a grand jury be recorded or transcribed. As this Court stated in *United States* v. *Franklin,* 429 F.2d 274, 276 (8th Cir. 1970): "We know of no case which holds that the failure to record and transcribe testimony given before a grand jury is ground for dismissal of any indictment returned." *See also United States* v. *Watson,* 421 F.2d 1357, 1358 (9th Cir. 1970). Recordation of grand jury proceedings is of fairly recent origin. At common law and at the time of the adoption of our Constitution, legal proceedings and grand jury proceedings were not recorded. We find no

constitutional right to have grand jury proceedings recorded. The trial court properly denied Harflinger's pretrial motion to inspect the grand jury minutes.

DISCLOSURE OF GOVERNMENT WITNESSES PRIOR TO TRIAL

We find no merit in the defendant's contention that the Government should disclose the names of its witnesses on a pretrial motion. Under 18 U.S.C. § 3432 the witnesses in a capital offense case must be disclosed at least three days prior to trial, but there is no rule or cases holding that the Government in a non-capital case must divulge the names of its witnesses in advance of trial. A denial of a motion seeking to compel disclosure is certainly within the discretionary authority of the trial court. *Dean* v. *United States,* 265 F.2d 544, 547 (8th Cir. 1959); *Ray* v. *United States,* 367 F.2d 258, 263 n.5 (8th Cir. 1966), *cert. denied,* 386 U.S. 913 (1967); *United States* v. *Glass,* 421 F.2d 832, 833 (9th Cir. 1969).

FIFTH AMENDMENT CONTENTION RELATING TO 26 U.S.C. §§ 5861(c) AND (d)

Harflinger in another pretrial motion sought to dismiss counts I and II of the indictment against him on the grounds that his Fifth Amendment privilege against self-incrimination constituted a complete defense to these counts. He relies on *James* v. *United States,* 366 U.S. 213 (1961), the trilogy of *Grosso* v. *United States,* 390 U.S. 62 (1968), *Marchetti* v. *United States,* 390 U.S. 39 (1968), *Haynes* v. *United States,* 390 U.S. 85 (1968), *United States* v. *Covington,* 395 U.S. 57 (1969), and *Leary* v. *United States;* 395 U.S. 6 (1969).

Count I charged Harflinger with knowingly possessing a firearm (the bomb) which has been made in violation of 26 U.S.C. § 5822, and Count II charged him with possessing a firearm which had not been registered to him in the National Firearms Registration and Transfer Record as required by 26 U.S.C. § 5841.

These counts were brought under the National Firearms Act, 26 U.S.C. Chapter 53, as amended by the Gun Control Act of 1968. 82 Stat. 1227 et seq. The amendments of course were enacted to overcome the adverse effect of *Haynes* on gun control legislation. Harflinger was not charged under 26 U.S.C. § 5861(f) as the maker of a firearm but rather was charged in count I as the possessor of an unlawfully made firearm. The requirements imposed under 26 U.S.C. § 5821 (paying the tax on making a firearm), 26 U.S.C. § 5822 (filing a written application to make and register a firearm), and 26 U.S.C. § 5841 (registering a firearm) all fall on the manufacturer or maker and are imposed upon the manufacturer or maker before he makes the firearm.[4] There are no requirements imposed on the possessor of an unlawfully made firearm.

We conclude that § 5861(c) does not violate Harflinger's privilege against self-incrimination guaranteed by the Fifth Amendment. Even under the old act (prior to the 1968 amendments), the charge of possessing an illegally made firearm was not subject to the *Haynes* defense. *Reed* v. *United States*, 401 F.2d 756, 762-763 (8th Cir. 1968), *cert. denied*, 394 U.S. 1021 (1969); *DePugh* v. *United States*, 401 F.2d 346, 351-352 (8th Cir. 1968);

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4 Harflinger did not claim to be the maker of the firearm and the evidence does not show him to be the maker of a firearm. Harflinger, therefore, cannot claim any privilege of self-incrimination which might possibly be claimed by the maker. *Reed* v. *United States*, 401 F.2d 756, 762-763 (8th Cir. 1968), *cert. denied*, 394 U.S. 1021 (1969).

Lewis v. *United States*, 408 F.2d 1310, 1312 (10th Cir. 1969); *Marshall* v. *United States*, 422 F.2d 185, 193-198 (5th Cir. 1970). Under the amended act, the possession of an illegally made firearm is illegal and cannot be validated once the illegality attaches to the firearm. Judge Matthes's reasoning in *Reed* v. *United States* is equally applicable to the amended act and the instant case:

> "We do not believe the Supreme Court intended that its holding in *Haynes* should be applied to a situation where, as here, the defendant was under no statutory command to and did not in fact supply any self-incriminating information." 401 F.2d at 763.

Count II of the indictment charged Harflinger with possessing a firearm which had not been registered to him as provided in 26 U.S.C. § 5841. The Gun Control Act of 1968 provided an amnesty period between November 2 and December 1, 1968, for the possessor of an unregistered firearm. During this period, the possessor could register the firearm without incrimination. Section 207(b) of the Gun Control Act of 1968; Public Law 90-618; 82 Stat. 1235. After the amnesty period there are no provisions in the act requiring a current possessor of an unregistered firearm to register. Under the amended act, the duty to register, except for possessors during the 1968 amnesty period, rests with the importer, manufacturer or maker and not on the transferee, although the firearm is registered to the transferee. Consequently, the statutory scheme of the amended National Firearms Act provides a method by which a person under certain circumstances can secure lawful possession of a firearm, in contrast to the old act which sought to compel disclosure of an unlawful possession. Furthermore, the new act does not require the possessor to furnish information to the government concerning unregistered firearms, although

possession of an unregistered firearm is unlawful of course under 26 U.S.C. § 5861(d).

The amended act also provides safeguards against self-incrimination by limiting the approval of transfers or "making applications" to those instances where transfer, receipt, possession, or making would not place the maker or transferee in violation of the law. 26 U.S.C. §§ 5812 and 5822. The amended act further provides that information or evidence obtained from a person attempting to comply with the provisions of the act shall not be used against a person in a criminal proceeding except in the case of perjury. 26 U.S.C. § 5848.

In *United States* v. *Valentine,* 427 F.2d 1344 (8th Cir. 1970), this Court upheld the validity of 26 U.S.C. § 5861 (d) against a challenge that it violated the defendant's Fifth Amendment privilege against self-incrimination. We are in complete agreement with Judge Lay's reasoning in *Valentine*:

> "Under the new Act, there is no obligation upon the possessor to register or furnish information to anyone. Thus, violation of the new Act occurs when a person elects to take possession of a firearm that is contraband inasmuch as it is not registered. In addition, under the amended Act, *all* 'firearms' must now be registered by the transferor rather than those which are unlawfully obtained. Under these circumstances, under the new Act there exists no compulsion to incriminate oneself." 427 F.2d at 1346-1347 (footnote omitted).

See also United States v. *Campbell,* 427 F.2d 892 (5th Cir. 1970).

Any attempted compliance with the statutory requirements with respect to either count of the indictment could

not have resulted in Harflinger's compulsory self-incrimination. Had an application been made to make the firearm, it would have been disapproved if the making or possession of the firearm would have placed the person making the firearm in violation of the law. 26 U.S.C. § 5822. Likewise, § 5812 requires that an application to transfer a firearm "be denied if the transfer, receipt or possession of the firearm would place the transferee in violation of law." There is thus no exposure to either state or federal prosecution for compliance with the provisions of the amended National Firearms Act challenged by Harflinger. The incriminating situations occurring under the trilogy of *Haynes, Marchetti* and *Grosso* cannot occur under the amended act.

We find that Harflinger's Fifth Amendment rights against self-incrimination have not been violated and the trial court properly overruled a motion to dismiss counts I and II of the indictment.

The defendant has vigorously contested this proceeding every step of the way by numerous pretrial motions raising any presently conceivable constitutional or legal issue, which he has the full right to do. He however has been accorded a full and fair trial and the evidence adduced strongly supports the judgment of conviction. We find no violation of any of his constitutional or legal rights and any other issues raised in his two briefs and not discussed herein are found to be without any merit.

Judgment affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

IN THE CIRCUIT COURT OF DOUGLAS COUNTY, MISSOURI

STATE OF MISSOURI,
Plaintiff,
-vs-
JAMES WILLIAM NASH,
Defendant

No. 6270

FILED
MAY 26 1969
J. C. TRUMAN, CLERK
BY [signature]
DEPUTY CLERK

STATE OF MISSOURI,
Plaintiff,
-vs-
ALFRED EARL HARFLINGER,
Defendant

No. 6268

BE IT REMEMBERED that heretofore on April 4, 1969, Defendants' Motion to Suppress Evidence came on for hearing in the above entitled cases before the Honorable Charles Barker, Judge of the 30th Judicial Circuit of Missouri, and the following proceedings were had and entered of record, to-wit:

APPEARANCES

For the State: Mr. Jerry Mee, Prosecuting Attorney

For the Defendants: Mr. M. J. Huffman, Attorney at Law, Hartville, Missouri

THE COURT: This is the motion to suppress and it is to apply to both cases?

MR. HUFFMAN: In both cases, State of Missouri vs. James William Nash, No. 6270, and State of Missouri vs. Alfred Harflinger, No. 6268. We want to introduce in evidence the transcript of the preliminary hearing had in both cases, it having been agreed that the two cases be tried together and the evidence of one case would be heard against both defendants, this preliminary hearing being held on March 10, 1969. We would like to introduce in evidence the transcript of that preliminary hearing. I understand Mr. Mee has no objection.

MR. MEE: No objection.

MR. HUFFMAN: Do you admit this transcript is the transcript which was duly prepared by Mildred Swope, the court reporter, on that?

MR. MEE: Yes.

THE COURT: That will be admitted.

MR. HUFFMAN: You take the one that has her signature on it. That is all the evidence we care to offer on behalf of the motion.

MR. MEE: There are a couple of items for the purpose of this motion.

THE COURT: All right, sir.

LESLIE HERIFORD, being sworn, testified:

DIRECT EXAMINATION BY MR. MEE:

Q You are the same Leslie Heriford who has previously testified at the preliminary hearing in the case of State of Missouri versus Nash and State of Missouri versus Harflinger, is that correct?

A Yes.

Q Mr. Heriford, directing your attention to February 22, 1969, you previously testified you were at Maple's Cafe when Bill Davis arrived, that you had a conversation with him there at the Maple's Cafe parking lot shortly after he arrived. Would you tell the Court the substance of the conversation that you had with Trooper Davis at that time?

MR. HUFFMAN: Before he testifies we want to object to that testimony as not being admissible on a hearing of any kind for the reason it is hearsay.

THE COURT: I doubt if it is admissible but I am going to hear it.

A I told Trooper Davis this was the two guys that was out at my bulk plant, I wanted to know why they were there. I had warnings to watch my equipment and it came from the fellow that I bought the truck from, he was the one that told me I should watch it at all times or put it under the light where I could see it at all times.

Q Did you tell that to Bill Davis at that time?

A Yes.

MR. MEE: That is all.

CROSS EXAMINATION BY MR. HUFFMAN:

Q When you testified here on March 10, 1969, in the preliminary hearing you testified to the truth, didn't you?

A Yes.

Q What you said without going into it, what you testified to as to what you found at your place, where your tank was located, where you lived and what acreage there was there, what tracks you found, the condition of your ground after you had seen somebody out there that was all the truth?

A Yes, sir.

MR. HUFFMAN: That is all.

THE COURT: Mr. Heriford at this time did you have any knowledge that any crime of any nature had been committed?

A No, sir, I just didn't want it to happen.

THE COURT: At the time you talked to Trooper Davis you didn't tell him any crime had been committed of any kind?

A No.

THE COURT: That is all.

(Witness excused.)

CORPORAL BILL DAVIS, being sworn, testified:

DIRECT EXAMINATION BY MR. MEE:

Q You are the same Corporal Davis who previously testified at the preliminary hearing involving the State of Missouri versus Nash and State of Missouri versus Harflinger, is that correct?

A That is true.

Q Corporal, you heard Mr. Heriford testify to the conversation that occurred near the Maple's Cafe on February 22, 1969, will you relate to the Court the substance of the conversation as told to you by Mr. Heriford?

MR. HUFFMAN: We will interpose the same objection we did as to Mr. Heriford's testimony.

THE COURT: Show the objection overruled at this time.

A A short time after we arrived at the Maple's Cafe Mr. Heriford came out the north door and stated that was the two subjects in the car that was at his place at 5:00 a.m. this morning. He told me he had prior warning to watch his equipment and further stated that one of them was wearing a boot of the same description as the track that was observed at his bulk tank. He further stated he was going on to his place of business at the south part of town.

Q How did you happen to go to the Maple's Cafe?

A I was called there or information was brought to me

by Marvin Loftin that Mr. Heriford wanted to contact us at the Maple's Cafe, that he thought the same subjects were there that could have been around his bulk plant.

MR. HUFFMAN: I object to all this line of testimony but go ahead.

A Marvin requested that I contact Mr. Heriford immediately at the Maple's Cafe which I did.

MR. MEE: I believe that is all I have, your Honor.

CROSS EXAMINATION BY MR. HUFFMAN:

Q Corporal, you testified here on March 10th at the preliminary hearing?

A I testified, I am not sure what date.

Q I wasn't either until I saw her transcript, I saw it was March 10th. At that time you were sworn and you told the truth about what you did, what the circumstances were connected with the apprehension of these men, what you detailed in that transcript is what transpired?

A Yes, sir.

Q You have heard the testimony of Mr. Heriford?

A Yes.

Q That he did not tell you that morning that any crime had been committed and he didn't, did he?

A No, he didn't.

MR. HUFFMAN: That is all.

REDIRECT EXAMINATION BY MR. MEE:

Q You weren't asked these questions concerning what specifically was told you that morning? You weren't asked that the day we held the preliminary hearing, were you?

A Pardon me, I am not sure.

Q Mr. Huffman infers that your story might have changed.

MR. HUFFMAN: I did not intend to do that. The only thing I wanted to do without asking him again all these other things he testified to if he told the truth about all of them.

Q (By Mr. Mee) You told the truth as to what communication was made by Mr. Heriford to you at the Maple's Cafe?

A Yes, that is right.

Q That is true, is it not? A Yes, it is.

MR. MEE: That is all I have.

THE COURT: Trooper, I haven't read all of your testimony yet, maybe it is in there, why did you stop the car in the first place?

A Well, there were several factors involved, your Honor. After receiving this information from Mr. Heriford stating that he had been warned to watch his equipment something might happen to it I went to the Maple's Cafe, I observed this vehicle that was a strange vehicle to me, two strangers were in the vehicle, also that the car was checked to Robert Brockman out of St. Louis, Missouri, also it was very clear

the subject driving the vehicle was not familiar with the area, he attempted to go the wrong way on the square and that is the basis of the stop.

THE COURT: The basis was what?

A Was the fact they were strangers and it is the custom, it is our custom to check strangers in the area.

THE COURT: Did you have any reason to believe that any crime had been committed at the time you stopped them?

A I didn't know of any crime that had been committed.

Q You had not been advised of any?

A No.

THE COURT: All right.

Q (By Mr. Mee) When you testified the reason for the stop was he was traveling the wrong way on a one way street, you said that was the reason for the stop. That was your testimony, was it not, why you stopped them?

A That is partially the reason.

MR. MEE: That is all.

RECROSS EXAMINATION BY MR. HUFFMAN:

Q When they came from the south on to the square here at Ava the driver of the car did first kind of start to go the wrong way but he didn't go the wrong way, he turned his car the right way?

A At the last minute he turned and went the right way.

Q As he was going up the square the right way on the right

side then is when you put your red light on him about halfway on the square and stopped him, wasn't it?

A They were acting in a strange way to me, in a strange manner.

Q You wouldn't want the Court to believe or me to believe or anybody else it is your practice when fellows come from Arkansas, Oklahoma or from Kansas or some other place you just stop them as a matter of routine to find out what they are doing?

A Yes, I do.

THE COURT: Did you stop him because of his starting the wrong way on the square or had you intended to stop him before he even got to that point?

A I had intended to stop the man regardless of where he was at.

THE COURT: When you did stop him, this pistol you saw the butt of, I am not clear where that pistol was, where was it?

A On the passenger side of the front seat, it was immediately to the right side near the front of the seat.

THE COURT: Between the seat and the door?

A No, right underneath the front seat close to the front.

THE COURT: It was not visible until the door was open?

A That is right, you couldn't see it unless you looked through the window or door.

THE COURT: Could you see it by looking through the window?

A I looked through the door and the window. I looked through the window to the back seat and front door.

THE COURT: You didn't see it until the door was open?

A That is correct.

THE COURT: That is all.

Q (By Mr. Huffman) I don't believe I asked you this at the preliminary hearing so I will ask you now. You had checked on the ownership of the car before you ever stopped these men?

A Yes.

Q You did that by your radio? A Yes.

Q No report had been made to you by anybody, by any of your superiors or peace officers or any other citizen this was a stolen automobile, had you?

A No stolen report on it.

MR. HUFFMAN: All right, that is all.

REDIRECT EXAMINATION BY MR. MEE:

Q Did you check these licenses as you indicate in your report, find out that the car operated by Harflinger was not owned by him?

A Neither [illegible] that was produced to Trooper Moore or myself [illegible] had received back on the car.

Q Did they tell you who owned the car?

A Mr. Harflinger stated a friend of his owned the car. He never did tell me who the friend was.

Q Did it raise suspicion in your mind?

A Certainly. He didn't tell me who owned the car, he told me it belonged to a friend of his. He didn't tell me who the friend was.

MR. MEE: That is all.

(Witness excused.)

I, Mildred Swope, official court reporter, of the 38th Judicial Circuit of Missouri, and certified shorthand reporter, do hereby certify that I was personally present at the time and place mentioned in the captioned sheet hereof, that I then and there reported said proceedings in Stenotype and that the foregoing 11 pages is a true and correct transcript of such notes so made at said time and place.

Mildred Swope
Court Reporter

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1453

ALFRED EARL HARFLINGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 436 F. 2d 928.

JURISDICTION

The judgment of the court of appeals was entered on December 31, 1970. A petition for rehearing was denied on February 8, 1971. The petition for a writ of certiorari was filed on March 10, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the stopping of an automobile on a public

highway to question the occupants about their suspicious behavior constituted an arrest.

2. Whether the subsequent warrantless search of petitioner's automobile was reasonable.

STATEMENT

After a jury trial in the United States District Court for the Western District of Missouri, petitioner was convicted on one count of possession of an unlawfully made firearm in violation of 26 U.S.C. (Supp. V) 5861(c) and one count of possession of a firearm not registered to him in violation of 26 U.S.C. (Supp. V) 5861(d). He was sentenced to concurrent prison terms of ten years. The court of appeals affirmed (Pet. App. A).

Shortly before dawn on February 22, 1969, Mr. Leslie Heriford awoke and observed a late model black and white Chevrolet standing crosswise in the road with its headlights shining on his barn. Heriford, who had been warned that "something might happen" to his equipment (H. Tr. 17), saw the car turn and drive slowly past the house (Tr. 87-88, 254, H. Tr. 6-8).[1] After telling his wife about this, he proceeded toward his office in Ava, Missouri, stopping enroute for coffee at a cafe with his nephew (Tr. 89, H. Tr. 8-9). There he received a telephone call from his wife informing him that she had just seen a similar car drive past their home and had observed tire tracks in the vicinity of the

[1] Tr. refers to the trial transcript and H. Tr. to the transcript of the hearing on a motion to suppress evidence, copies of which are being lodged with the Clerk of this Court.

18,000-gallon gas storage tank Heriford maintained on his premises (Tr. 84-86, 89, 108, H. Tr. 10-11).

Heriford drove back to the storage tank and, upon seeing the tire tracks around the tank, also noticed a set of distinctive footprints in the snow (Tr. 89-91, H. Tr. 12-13). When he returned to Ava shortly thereafter, he spotted a car similar to the one he had seen near his barn parked in front of another cafe (Tr. 92, H. Tr. 14). Heriford entered the cafe and saw two strangers later identified as petitioner and his companion, Nash. The companion's boots appeared to match the footprints observed at the tank (Tr. 93-94, H. Tr. 15). Heriford sent his nephew to locate the local state trooper so that he could find out why the men had been around his place (Tr. 94, H. Tr. 14).

Trooper Davis drove over to the cafe after being informed by the nephew of what Heriford had observed (Tr. 110-111, H. Tr. 31-32). As the trooper arrived, petitioner and Nash drove off (Tr. 95-96, H. Tr. 32-33). Since the occupants of the car appeared to be strangers, Davis called headquarters for a check on the car. He was informed that the car was registered to a Robert Brockman of St. Louis, Missouri (Tr. 111-112, H. Tr. 33, 35).

Heriford met the trooper and informed him of the earlier events and the warning he had previously received. He stated that the car appeared to be the same one he had seen that morning and that the boots worn by petitioner's companion appeared to be similar to those that had made the footprints around his bulk storage tank (H. Tr. 17, 26, 34).

Trooper Davis and his partner then proceeded in their marked patrol car in the direction petitioner had driven (Tr. 113, H. Tr. 35). Petitioner's car had by then turned around, and passed the troopers heading back toward the town square. Trooper Davis turned his car around and followed (Tr. 114, H. Tr. 35-36). As petitioner's car approached the square, it started into the square as if to go in the wrong direction on the one-way street, then abruptly turned and went the correct way (Tr. 116, H. Tr. 38). At this point the trooper turned on the patrol car's red light and petitioner pulled his car diagonally into the curb (Tr. 116, 257, H. Tr. 38, 39).

Petitioner and Nash got out and were met at the rear of their car by the two officers (Tr. 117, H. Tr. 40). Davis inquired about their business in Ava and asked for their identification. Both men produced their driver's licenses. Petitioner stated that he was looking for a friend named "Art." Nash said that he was a heavy equipment operator and was looking for work (Tr. 117-119, H. Tr. 40-41). Petitioner stated that the car belonged to a friend but he refused to name the friend and failed to produce registration papers for the car (Tr. 119, H. Tr. 41-42).

After looking into the rear window (Tr. 120, 121, H. Tr. 42), Davis walked toward the front of petitioner's car. Through the passenger side door, which Nash had left open, he saw what appeared to be the handle of a chrome-plated handgun (Tr. 122, H. Tr. 43). Davis then went around the car and opened the door on the driver's side. Finding nothing under the

driver's seat, he reached over and got the gun, a fully loaded .38 caliber revolver. He also recovered a loaded clip of .45 caliber ammunition from under the other side of the seat (Tr. 122, H. Tr. 45). Davis unloaded the .38 revolver, informed petitioner and Nash that they were under arrest for carrying concealed weapons, and gave the men *Miranda* warnings (Tr. 123, H. Tr. 45-46).

Thereafter at Trooper Davis' request, petitioner opened the car trunk with his keys (Tr. 123, H. Tr. 46). Inside the trunk Davis saw a cardboard box containing ten sticks of dynamite, a clock, a fuse, a blasting cap and a battery with wires running from the dynamite to the clock and the battery. The clock was ticking (Tr. 123-126, 138, H. Tr. 46). Petitioner and Nash, both of whom disclaimed any knowledge of the device (Tr. 126, 259, 260, H. Tr. 47), were then handcuffed and taken to the nearby sheriff's office (Tr. 127, 258, 279, H. Tr. 47). Since a crowd had begun to gather, Trooper Davis locked the car trunk after disconnecting the wires and had a bystander drive it to the sheriff's office (Tr. 124-127, 128, H. Tr. 47-49, 65).

Davis returned to the sheriff's office and booked the two subjects. They were again given *Miranda* warnings and refused to answer any questions (Tr. 128, 258-259, H. Tr. 50). The car was then reopened and the device brought from the car into the sheriff's office where it was disassembled (Tr. 128-129, 160-162, H. Tr. 50). It was established that the seized components constituted a time bomb that could have been readily activated (Tr. 186-190, 195-197). One stick of dynamite

and one blasting cap were test fired and functioned as designed (Tr. 166-167, 184-185). The device was not registered as required by 26 U.S.C. (Supp. V) 5861 (Tr. 198-201).

ARGUMENT

1. Petitioner principally contends that the stopping of his automobile for investigatory questioning, without probable cause to believe that he had committed a crime, was an unlawful arrest and that any evidence obtained incident to that stopping should have been suppressed.

Terry v. *Ohio,* 392 U.S. 1, 19-20, recognized the distinction between an arrest and a limited detention of the person short of arrest by holding that the latter could be done for investigative purposes on the basis of reasonable suspicion less than probable cause. There is no distinction between the rights of the pedestrian walking on the public streets, involved in *Terry,* and those of a person driving on the same streets in an automobile. As the court below held, both are subject to the limited intrusion approved in *Terry.* Petitioner relies on *Henry* v. *United States,* 361 U.S. 98. But in that case the government felt bound by a concession in the lower courts that the arrest took place at the time the car was stopped; this court accepted the concession and determined the case on that basis.[2] See

[2] "The prosecution conceded below, and adheres to the concession here, that the arrest took place when the federal agents stopped the car. That is our view of the *facts of this particular case.* When the officers interrupted the two men and restricted their liberty of movement, the arrest, *for purposes of this case,* was complete." 361 U.S. at 103 (emphasis added; footnote omitted.)

also *Rios* v. *United States,* 364 U.S. 253. The courts of appeals that have ruled on the issue have uniformly held that the mere stopping of a car does not of itself constitute an arrest. *United States* v. *Thompson,* 420 F. 2d 536 (C.A. 3); *Carpenter* v. *Sigler,* 419 F. 2d 169 (C.A. 8); *United States* v. *Williams,* 416 F. 2d 4 (C.A. 5), certiorari denied *sub nom. Ferino* v. *United States,* 397 U.S. 910; *Trusty* v. *Oklahoma,* 360 F. 2d 173 (C.A. 10). See also *United States* v. *Johnson,* C.A.D.C., No. 23,900, decided March 22, 1971.

Under the test announced in *Terry,* it is clear that: (1) Trooper Davis' limited action "was justified at its inception"; and (2) the action "was reasonably related in scope to the circumstances which justified the interference in the first place." 392 U.S. at 20. Had proper proof of ownership of the car been forthcoming, and had no other incriminating circumstances developed, petitioner would presumably have been allowed to proceed on his way after very brief and limited questioning. During this time, however, the officer observed a revolver in the car in plain view, and this led to the arrest. No search of the subjects or their car was attempted prior to this discovery. Under these circumstances, the limited "seizure" of petitioner was reasonable.[3]

2. There is no substance in petitioner's contention that the discovery and seizure of the bomb in the trunk violated the Fourth Amendment. The revolver, which

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[3] As the court below noted, the propensity of Trooper Davis to interfere with out-of-state travelers is irrelevant. (Pet. App. A9-A10.) The basis of his action in this case was reasonable suspicion of criminal activity based on facts disclosed by a reliable citizen.

was visible to the trooper through the open door of the car from a vantage point where he had a right to be, was properly subject to seizure. *Harris* v. *United States,* 390 U.S. 234. The discovery of the revolver provided probable cause to arrest petitioner as well as an adequate basis to search the car for other weapons. *Chambers* v. *Maroney,* 399 U.S. 42; *Brinegar* v. *United States,* 338 U.S. 160; *Carroll* v. *United States,* 267 U.S. 132. Once the trunk was opened and the bomb discovered, its seizure was proper. The fact that the bomb was not seized until after the car had been removed from the scene, where a crowd had gathered, did not invalidate the seizure; the officers had a duty to protect the public from danger.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1971.

☆ U.S. Government Printing Office: 1971—421–900/572